Supreme Court, U.S.
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No. 01-1347

IN THE

Supreme Court of the United States

MCS MANAGEMENT, INC.,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SAM ZALMAN GDANSKI
Counsel of Record
3 Rockwood Lane
Suffern, New York 10901
(845) 362-4800

Of Counsel:

SCOTT HOWARD GDANSKI
JEFFREY ISAAC GDANSKI

60pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals decision affirming the United States Court of Federal Claims decision that the United States Marine Corp. need not have set aside as a small business set aside, an east coast and west coast food service contract, violated Federal regulations requiring a small business set aside exclusively for small businesses when there is a reasonable expectation that two small businesses could perform the contract at fair market prices.

PARTIES TO THE PROCEEDINGS BELOW

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

Petitioner is a corporation. It has no parent or subsidiary corporations.

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Other Authority

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PETITION FOR WRIT OF CERTIORARI

MCS Management Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

Opinions Below

The Dec. 7th, 2001 opinion of the United States Court of Appeals for the Federal Circuit affirming the opinion of the United States Court of Federal Claims appears at 2001 U.S. App. LEXIS 27674 Dec. 7, 2001. The opinion of the United States Court of Federal Claims is reported at 48 Fed. Cl. 506, Dec 21, 2000. The General Accounting Office decision B-285813, and 285 882 is published at 2000 CPD Comp. Gen. P 187 Oct. 11, 2000.

Jurisdiction

The opinion of the United States Court of Appeals for the Federal Circuit was entered on December 7, 2001. The jurisdiction of this court is invoked under 28 U.S.C. § 1255(1)1.

Statement of the Case

The absence of a written decision by the Court of Appeals summarily affirming the decision below in effect makes the Court of Federal Claims decision, which in essence adopted the General Accounting Office decision, policy for the entire United States. This because the adoption of the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 1104-320, 110 Stat. 3870 (1996) which did away with the simultaneous jurisdiction previously available in United States District Courts nationwide, made the Court of Appeals

for the Federal Circuit the exclusive circuit for federal government contract questions, in effect the law of the land. Because of this ramification and the fact that henceforth all future procurements will in effect be guided by a lower court decision, all federal procurement dollars and decisions by federal procuring officials will be guided by this. This policy if left unreversed will have the effect of minimizing the dollar volume of business to be set aside under Regulatory law and the historical rule of 2, which was utilized to maintain the existing base of small businesses, important defense production capability and ultimately lower prices for the U.S. government, including a wider source of diversity and base for the U.S. government contract business. The increasing merger and acquisition activity of the larger defense contractors, together with this decision will have the effect of eliminating the historical base and the congressionally mandated requirement of the Rule of 2. The specific consequences for the petitioner in this case is an elimination of the bulk of his business, but the direct consequences will impact the entire government procurement policy. The rule of 2 requires that when there is a reasonable likelihood 2 or more small businesses can submit an offer at a reasonable price, the procurement shall be set aside for small businesses.

The decision by the Court of Federal Claims is without foundation, contrary to legislative history and prior precedent of applicable General Accounting Office cases, is not compelled by the text of the Federal Acquisition Regulations, has no support in relevant decisional law and is directly contrary to governing procurement regulations.

By virtue of the court's decision, governmental bodies will rapidly expand by a policy of bundling, ignoring the Rule of 2.

We submit that the rule announced in this case (1) destroys the integrity of the small business contract base, (2) places an unfair burden on small businesses to compete with large businesses when Congress and the Courts have previously recognized the preferred status of small businesses.

Review by this court is necessary to correct a situation, which if left as is will severely impair the entire system of government contracts with attending unwillingness and financial inability of small businesses to undertake such work and destroy the long acknowledged effectiveness of the Rule of 2.

FACTS

Federal Acquisition Regulation ("FAR") Section 19. 502-2(b) requires contracts be set aside exclusively for small business when there is a reasonable expectation that two small business could perform the contract at fair market prices. In this case, the Marine Corps issued two similar solicitations for food services of separate mess halls. There was one contract for the east coast (RFP M00027-00-14-0001) and one for the west coast (RFP M00027-00-0002). The Marine Corps preferred a large business, and therefore neglected to perform the necessary analysis, issued the procurements on an unrestricted basis, and MCS protested this issue at the General Accounting Office ("GAO"). The GAO held a hearing and ultimately issued a decision on October 11, 2000 denying MCS's protest. MCS then brought this issue before the United States Court of Federal Claims. The Court denied a request for a temporary Restraining Order, and finally denied Plaintiff's request for relief in a decision filed December 21, 2000. *MCS Management Inc. v. United States* 48 Fed. C1. 506 (2000), Dec. 21, 2000. There was a summary affirmance per curium,

MCS Management Inc. v US 2000 U.S. App. LEXIS 27674, Dec. 7, 2001.

MCS Management Inc. ("MCS") is a company organized and existing under the laws of Texas. MCS is an experienced food service Contractor with specific experience providing food services to the U.S. Marine Corps. The Marine Corps issued two separate solicitations M002-00R 0001 for the East Coast, and M0027-004 0002 as unrestricted on January 7, 2000. The two contracts being solicited are bundling of several smaller contracts that were previously procured separately.

The Marine Corps never performed the necessary analysis required to determine if in fact a small business could perform either one of these solicitations. Therefore it is the Agency's lack of action that was unreasonable.

This is a case of first impression for this Court. The Courts ultimate decision will affect not only this procurement but also the entire United States Government Contracting Small Business community. If the lower Court decision is left standing the design behind the Small Business Act maintaining the industrial base of America's small business will have been eviscerated.

Reasons for Granting the Writ

Governing procurement regulations contradict the court's conclusions.

The issue In This Case Has Not Been Decided By This Court Nor Has This Court Otherwise Spoken Plainly On The Issue.

The key reason that this court should accept this petition is precisely because of the fact that there is only one Circuit that sets precedent for the entire procurement base nationwide and oversees U.S. government con-

tracting. With the elimination of Federal District Courts there will never be the opportunity for diverse conflicting interpretations which historically occurred Procuring activities will seize upon this and rapidly interpret utilizing a Madison Avenue approach that whenever the phrase "new and improved" is used, although the same old procurement is being obtained, therefore is "a new" procurement hence no requirement to adhere to the Rule of 2.

I. The Court of Appeals Decision Affirming the US Court of Federal Claims Decision That No Small Business Set Aside Was Required Was Arbitrary and Capricious, Unreasonable and Violated Federal Acquisition Regulation 19-502-2(b) Which Requires That Solicitations Be Set Aside For Small Business If There Is a Reasonable Expectation That Two Small Businesses Will Bid on the Solicitation at a Fair Market Price

Although no specific method of determining two small business interests has been prescribed, an Agency's actions must be reasonable. In doing so, a reasonable examination must be conducted, which was not done in this specific case, despite clear expressions of interest. The fact recitation of how this solicitation evolved clearly indicates that from the inception the Marine Corps was predisposed to support its decision that this should not be a small business set aside.

This Court should look to *Safety Storage*, 98-2 CPD 102 and *N&N Travel & Tours*, B-285164.2 2000 US Comp. Gen 128, both of which cite *McSwain* and *Associates, Inc.* 96-1 CPD paragraph 255 that "the assessment must be based on sufficient facts so as to establish its reasonableness.

There is no one type of assessment that has to be performed but it must be sufficient based on the facts.

In *Safety Storage*, the GAO had to examine the totality of the facts on what the procuring Agency did. It is important to understand the guiding parameters cited in *McSwain*.

> The protestors maintained that there are several small business firms, including the protesters that are capable of fulfilling the contract requirements and are interested in competing. An acquisition of services is *required* (underlining added) to be set aside for excusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at fair market prices. Federal Acquisition Regulations Act 19.502-2(b). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion, which we will not disturb absent a showing that it was unreasonable. *Neal R. Gross & Co., Inc.* B-240924.2, efforts to ascertain whether it is likely that it will receive offers from at least two small businesses with the capability to perform the work and we will review a protest to determine whether an Agency has done so . . . (citations omitted). In this regard, we have found unreasonable a determination to issue a solicitation on an unrestricted basis where that determination is based upon outdated or incomplete information. *Library Sys & Services/Internet Systems, Inc.*, supra. The record does not show that the contracting officer met her duty to reasonably investigate whether the procurement could be set aside for exclusive small business participation. Based upon

the facts underlying the determination as they were provided to us, the Agency's determination not to set aside the procurement was based upon incomplete information and unsupported assertions. While the use of *any particular method of assessing the availability of small business is not* required, a measure such as *prior procurement history, market surveys and/or advice from the Agency's small business specialist and technical personnel may all constitute adequate ground for a contracting officer's decision not to set aside a procurement . . . (citations omitted), the assessment must be based on sufficient facts so as to establish its reasonableness.* Here, however, the Agency's general assertion that the service areas are *too large* (underlining added) to be successfully serviced by a small business simply states a conclusion that it not establish by any facts provided by our Office. The Agency offers no meaningful comparison of the current requirements to those of the service areas which have been successfully serviced by small business in the past to support its position, . . . For instance, the Agency *did not contact any of the small businesses that expressed interest in the contract*, or those with known REAM contract experience, to ascertain whether they were qualified to meet the increased requirements. *Rather, the Agency concluded without evidentiary support, that any small business would be incapable of meeting the contract requirements, particularly with regard to financial capacity.* Although the Agency states that it reviewed prior small business REAM contracts and proposals in reaching its conclusions, the Agency has not explained how a review of these prior contracts is relevant to determining the availability of responsible small businesses to meet the current require-

ments. The Agency's conclusion that small business contractors lack the financial capability to satisfactorily perform the contract was *based upon the Agency's experience with incumbent small business contractor's complaints regarding their need to use their own financial resources* (sometimes exceeding $100,000.0) *between Agency payments.* When protesters respond, however, that they are financially able to perform the current contract requirements and that the contractor complaints referenced by the Agency were the result of the Agency's own violators of the prompt payment terms of those contracts. The Agency has not rebutted the protesters' position and in the absence of any further explanations concerning these circumstances and the cause of the small business incumbents' complaints, *we are not persuaded that this concern justifies an unrestricted procurement where other small businesses may in fact* have the financial capability (the record shows that there has been no review of the interested small business' financial capability to satisfactorily perform the current requirements in accordance with the RFP's payment terms). We do not question the legitimacy of the Agency's concerns that the increased requirements may be excessive for certain small business or reach any conclusion as to whether there actually are small businesses that can meet the RFP's requirements. We find only that the Agency was required to more actively investigate the current capabilities of at least a representative member of interested small business firms before determining based only upon incomplete information and unsupported assertions, that no small business concern would be able to perform the work. Because the Agency failed to make reasonable efforts to ascertain whether the small

> business firms are able of performing the contract, we conclude that the decision not to set aside this procurement for exclusive small business competition is not adequately supported and therefore the protests are sustained.

The recommendation there was that the contracting officer just like in *Safety Storage* adequately investigate the potential small business interest in this procurement.

These facts are strikingly similar to our case. The Companies here, as in our case, objected to provisions in the procurement, yet still voiced a desire to compete.

The Court could on the record, conclude that there are in fact two small business concerns such as *MCS Management Inc.; Rice; and Selrico*, and therefore order the procurements set aside for small business. Certainly the Court could find that the Agency actions in this regard similarly violated the required assessment and analysis that the GAO found was omitted in *McSwain*, supra.

In *McSwain*, the GAO went on to conclude that "if the contracting officer finds that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns (and that award can be made at a fair market price), the Agency should take the necessary steps to set aside this procurements for small businesses. See also *Wind Gap Knitwear. Wind Gap Knitwear, Inc.* B-251411; B-2451413; 93-1 CPD, 281, March 31, 1993.

In *Wind Gap*, an Agency decision to conduct procurements on an unrestricted basis and not as a small businesses set-aside was held to be improper where the contracting officer did not investigate the performance capabilities of at least four small businesses that had bid on the prior set-aside of these requirements, and, therefore, could not reasonably conclude that a reasonable

expectation did not exist that offers could be obtained from at least two responsible small businesses. In *Wind Gap*, the contracting officer argued that he had no basis for concluding that these firms with no government contracting experience were responsible bidders. Further, the contracting officer even found that Wind Gap, the incumbent was not a "responsible" firm because of problems incurred in connection with performance on two prior contracts.

The GAO correctly found that an Agency is required to continue setting aside acquisitions for a particular product or service where it has previously been the subject of a successful set-aside and where, as in *Wind Gap* Agency regulations so require, unless the contracting officer determines that there is not a reasonable expectation of receiving offers from at least two responsible small businesses at fair market prices. FAR at 19.501(g); Defense Federal Acquisition Regulation Supplement at 219.501(g). That determination itself must be reasonable. *Neal R. Gross & Co., Inc.* 72 Comp. Gen. 23 (1992), 92-2 CPD. Para. 269.

In describing what constitutes "reasonable efforts" to ascertain whether it is likely that the Agency will receive offers from at least two small businesses with the capabilities to perform the work the GAO in *Wind Gap* found that such a determination to issue a solicitation on an unrestricted basis where that determination is based upon outdated or incomplete information is not reasonable.

"We conclude here that the Agency did not reasonably determine that there was no likelihood of receiving, offers from at least two responsible small business. First, four small business concerns without prior government contracting experience submitted acceptable bids on both of the prior small business set asides. **The record**

failed to show that the Agency ever contacted any of these small businesses to determine if they were capable of meeting the delivery requirements under these RFPs or would be interested in competing. (Bold and underlining added). The contracting officer rejected these firms as potential small business offers for the current RFPs solely because of their lack of prior government contracting experience. One of the goals of federal procurement, however, is to increase small business participation. See FAR at 19.201, 19.202-2. To allow agencies in making a set-aside determination to eliminate from consideration small businesses with no record of sales to the government would defeat the purpose of the small business set-aside to encourage and permit these firms to participate in government procurements. Therefore, the fact that a small business has made no sales to the government does not excuse an Agency from considering it as potential supplier." The GAO went on to find unreasonable the contracting officer's determination that there was no reasonable expectation that at least two responsible small businesses would submit offers at fair market prices. The issue here apparently was that there was incomplete and inadequate information upon which the contracting officer relied on. In our particular case, where there was repeated express affirmative representations, the contracting officer's actions are totally unreasonable and, therefore, arbitrary and capricious and violate procurement statutes.

The Marine Corps violated the Federal Acquisition Regulations Section 19.502-2(b), which require these two solicitations to be set aside for small businesses if there is a reasonable expectation that at least two small businesses will bid on the solicitation for a fair market price.

The record is clear that the Marine Corps never performed a review of the abilities of the five small businesses that specifically expressed interest in bidding, and never performed a market analysis of their proposed prices to determine if they would be considered fair. The Marine Corps argued that these solicitations are larger than any previous solicitation, and would require investments that would automatically preclude there being a reasonable chance that two small businesses could offer responsible offers at fair market prices. In determining this, the Marine Corps did not feel it was necessary to look at the specific capabilities of the companies involved, and instead simply assumed that no small business could handle it. This can be evidenced by the fact that they did not do any analysis of the abilities of the companies. They did not ask the company how they proposed to handle the contract and how they proposed to raise the necessary capital, and never even did an analysis of the companies' present abilities to perform. The Marine Corps instead based their conclusions on assumptions and prejudices towards small businesses, and did not conduct a proper analysis based on the facts, as they should have gathered them.

The argument the Marine Corps is making that these solicitations represent a totally new approach to food services is completely false, and a mischaracterization of the facts. Although these solicitations are larger than any previous single solicitation, there were small businesses that have performed the same amount of work as either current solicitation, albeit under several different contracts. MCS present Dan Moore states that:

> The Marine Corps had eight previous full food service contracts with small businesses feeding more than 14,000,000 meals per year. Twice the Marine Corps had single, small business contractors (IMI of

> Walnut Creek, CA; and MCS of San Antonio, Texas) with full food contracts at Camp Lejune, NC and Camp Pendleton, California at the same time, the two largest feeding installations in the Marine Corps, whose combined service requirements exceed the estimates of either of these current solicitations individually. During Operation Desert Shield and Desert Storm, MIM provided full food services to nearly every mess hall at both bases, which is a more significant effort than that represented in either of these two solicitations.

This was the exact issue in *Seattle Security Services v. United States*, 45 Fed. Cl. 560, (1999) where the Court decided that a contracting officer cannot downgrade an offeror simply because their experience was from several different contracts that added up to the same size as the current procurement.

Moreover, the Agency attempts to argue that this is qualitatively different approach to food service. However, that is obviously a ruse to defend that Marine Corps' improper actions. The fact is that the Marines will be eating the same food cooked according to required Armed Services Menu Cards, which have not changed in the new solicitation. The Marines will be eating in the same mess halls as they have always been eating in. The only main difference is that the contracts are now larger, and since there are only two contracts, the awardee *may choose* to take advantage of centralized cooking and delivery procedures and bulk size food purchases. However, the supplier of the food is exactly the same as it always has been in the past, and there is not a situation where large businesses may be able to take advantage of their large purchasing power to secure a cheaper price on the food, as all the food must be purchased through the DSCP. The DSCP is a government

Agency that purchases all the food for the armed services, obtaining the best price, due to its total buying power. Therefore, there is no issue of small businesses not being able to secure competitive prices on the food, as all the prices are preset.

Moreover, the fact that these new contracts are for a much higher dollar amount is misleading because the main difference between the current solicitations and previous contracts that offerors will be buying the food directly from DSCP, instead of the Marine Corps buying the food, and then the contractor informing the Marine Corps what type of food and, what amount was necessary. However, that does not make any practical difference to the contractor. Under the previous contracts the contractor was responsible for managing the amount of food needed to be purchased, and handling the food once delivered by DSCP to the mess halls. This is all done using a computer system called MCFMIS, which is a database of prior history at that mess hall of what type of food is necessary, and in what quantity, to feed the Marines.

Congressional Intent Favoring Small Business

J.H. Rutter Rex Manufacturing Co., Inc. 706 F.2d 702 June 9, 1983. Court of Appeals for the 5th Circuit passed on the issue of whether "set aside" provisions of government contract for exclusive participation by small business concerns exceeded statutory authority. In concluding that it did not and that it did not unlawfully deprive non-small business of certain property rights, the Court had occasion to review DOD Regulations and the implementing Federal Acquisition Regulations which formed the regulatory authority that set forth guiding principles and law when Congress passed the Armed Services Procurement Act in 1947 which stated,

> "It is the policy of Congress that a "fair proportion" of the purchases and contracts under this Chapter be placed with small business concerns. 10 U.S.C. at 2301. The Senate Report accompanying this legislation noted that this requirement was grounded in a desire to diversify the Nation's defense production and thus add 'production security in the event of any emergency and assist in establishing insurance against a bottleneck' S. Rep. No. S71, 80th Cong. 1 St. Sess. 6 (1947)."

The decision noted that this "fair proportion" concept extended to all government contracts when the Federal Property and Administrative Services Act of 1949 (41 U.S.C. at 251 et seq.) was amended with the Small Business Acts of 1953 and 1958 (15 U.S.C. at 631 et seq.)

The 1953 Act stated:

> "It is the declared policy of the Congress that the government should aide, counsel, assist and protect insofar as is possible the interests of small-business concerns in order to serve free competitive enterprise to ensure that a fair proportion of the total purchases and contracts for supplies and services for the Government be placed with small business enterprises, and to maintain and strengthen the overall economy of the Nation. (15 U.S.C. at 631)"

The 1958 Act provided slightly more specific guidelines for procuring agencies attempting to company with Congressional intent when it declared that Government procurement contracts should be awarded to small business concerns when such awards are determined:

1. To be in the interests of maintaining or mobilizing the Nation's full productive capacity;

2. To be in the interest of war and national defense programs;

3. To be in the interest of ensuring that a fair proportion of the total purchases and contracts for property and services to the Government are placed with small business concerns;

4. To be in the interest of assuring that a fair proportion of the total sales of Government property made to small business concerns . . . 15 U.S.C. at 644(a).

It is precisely to implement these goals that the import of Congressional intent be understood in the concept of these procurements at issue in this litigation. A set aside contract for the manufacturer of a nuclear submarine, Stealth-fighter, M1 Abrams tank can clearly be understood to be something that would not be reasonable if the contract in question as the prime contract was reserved for small business. This would presumably be understood when any kind of market survey or interest might be expressed by a possible contractor and quickly dismissed when the production capabilities are assessed and whether in fact these small business could manufacture at fair prices. However, for the procurements in question, there is no such myopic vision that precludes current existing small businesses from such an opportunity. That is why in 1958, "The DOD adopted regulations intended to implement the requirements of the procurement statute. These regulations provided, inter alia that certain Government acquisitions would be 'set aside for the exclusive participation of small business concerns.' 32 C.F.R. 1-706.1(b). The regulations further provided that such set aside would occur if the contracting officer determined that there is a reasonable expectation that (i) offers will be obtained from a significant number of responsible small business concerns and (ii) awards will be made at reasonable process. 32 C.F.R. 1-706.3(a). In

1979, sub part (I) of the above regulation was amended to provide that bids need only be reasonably be expected from 'at least two responsible small business concerns.' 32 C.S.R. at 1-766.5"

The Court in *J.H. Rutter* Rex Manufacturing Co., Inc. supra went on to note that "The essence of the American economic system of private enterprises is free competition. Only through full and free competition can free markets, free entry into business and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but the security of this Nation," 15 U.S.C. at 631(a). But it noted that the "Small Business Act and regulations favoring small businesses modify these more general requirements that agencies procure goods at competitive market prices . . ." as long as they are reasonable. This is an excellent decision, which reviews the competing interests of full and fair open competition and the more preferential treatment for small businesses because of Congress' concern to maintain the economic base of such small businesses, which in turn strengthens the security of the Nation. It even cites to other opinions in the decision, which recognized that the prices offered by a small business may not necessarily be the cheapest as long as they are a fair market price.

On June 21, 2001, in a *bipartisan fashion* in a hearing of the House Small Business Committee, Representative Donald Manzullo, R-III Chairperson, and Nydia Velazquez, D-N.Y., stated that the Defense Department, "must do more to ensure that acquisition reforms do not drive small businesses out of the federal market." "At a hearing of the House Small Business Committee, Manzullo and Velazquez took turns blasting the Pen-

tagon for falling short of its small business procurement goals and for promoting contracts bundling, a practice in which federal contracts are combined without others before being put out for bid. Bundling makes it more difficult for small firms to bid on federal contracts".

A Report by the Committee on Small Business Democrats, Representative Media M. Velazquez Ranking Democratic Member, United States House of Representatives, September 6, 2001 entitled Scorecard III. How Federal Agencies Continue to Fail America's Small Businesses ranked the Department of Defense a "D" in meeting Small Business goals. "In FY 2000, the federal government contracted for more than $200 billion in good and services, which is an 8% increase over FY 1999, small businesses saw no benefit from this increase in government spendings." "Since the small business goals was not met by the federal government in Scorecard II, small firms suffered the loss of more than $2 billion in contracts." "But as the purchasing power of the government is on the rise, there appears to be a downward trend showing small businesses losing ground in and access to the federal marketplace. As a result of streamlining the federal contracting process, fewer small businesses are able to compete for these contracts. The fallout from this limited competition includes lower quality products at a higher price. The end results Taxpayer dollars contributing to a flawed system that fails to yield the best market value."

"Now more than ever, small businesses play a critical role in the US economy. In fact, small businesses contribute to over 47% of the total retail sales and account for approximately 40% of the nearly $2 trillion dollars in federal tax revenues that the government collects each year.

Conclusion

The Court should review this case; this is an issue of substantial public importance. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: March 7, 2002

Respectfully Submitted,

SAM ZALMAN GDANSKI
Counsel of Record
3 Rockwood Lane
Suffern, New York 10901
(845) 362-4800

Of Counsel:

SCOTT HOWARD GDANSKI
JEFFREY ISAAC GDANSKI

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-5049
Filed December 7, 2001

MCS MANAGEMENT, INC.,

Plaintiff-Appellant,

—v.—

UNITED STATES,

Defendant-Appellee.

Judgment

On Appeal From the United States Court of Federal Claims in Case No. 00-CV-639

This cause having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam

(SCHALL, *Circuit Judge*,
ARCHER, *Senior Circuit Judge*,
and BRYSON, *Circuit Judge*).

AFFIRMED. *See* Fed. Cir. R. 36

Entered by Order of the Court

JAN HORBALY/BS

JAN HORBALY, Clerk

Dated December 7, 2001

Costs: Against, Appellant.
Total $543.20
Issued as a Mandate: January 28, 2002

UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-639-C
(Filed Under Seal December 21, 2000)
(Reissued for Publication on January 18, 2001)

MCS MANAGEMENT, INC.,

Plaintiff,

—v.—

THE UNITED STATES,

Defendant.

FAR § 19.502-2(b); Standard of Review, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Sam Z. Gdanski, Suffern, NY, attorney of record for plaintiff. *Jeffrey Gdanski* and *Scott Gdanski*, of Counsel.

Bryant S. Banes, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for defendant, with whom were *Deborah A. Bynum*, Assistant Director; *David M. Cohen*, Director; and *David W. Ogden*, Assistant Attorney General. *Julius Rothlein*,

U.S. Marine Corps; *Andrea Mayer*, U.S. Small Business Administration, of counsel.

OPINION

DAMICH, Judge.

I. Introduction

This is a pre-award bid protest. This matter is before the Court on cross-motions for judgment upon the administrative record.[1] Plaintiff seeks to enjoin the United States Marine Corps (USMC) from awarding two contracts for regional garrison food service. Plaintiff contends that the contracting officer's decision not to set aside the two solicitations exclusively for small business was arbitrary and capricious and in violation of procurement law. For the reasons stated herein, Plaintiff's motion for judgment upon the administrative record is DENIED. Defendant's motion for judgment upon the administrative record is GRANTED.

II. Background

A. Facts

The Requests For Proposal (RFP's) provide for award of two primarily fixed-price incentive contracts, with

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[1] Plaintiff filed a motion for a permanent injunction pursuant to Rule 65 of the Rules of the Court of Federal Claims. However, Rule 65 does not refer to permanent injunctions. RCFC 65 concerns preliminary injunctions and temporary restraining orders. The Court will treat Plaintiff's motion as a motion for judgment upon the administrative record in which Plaintiff seeks a permanent injunction.

a base period of five years, and three one-year options, to provide regional garrison food service for the USMC at: (1) 32 messhalls on the East Coast (RFP M00027-00-R-0001), and (2) 23 messhalls on the West Coast (RFP M0002700-0002). AR 4720 & 5252. The estimated value of each regional contract is approximately 45 million dollars. AR 3790. Current messhall contracts are valued between $360,000 - $7,000,000 each. According to Defendant, the RFP's "represent a fundamentally new and qualitatively different approach of feeding Marines in the garrison messhall environment." AR iii-v. As stated in the RFP's, the goal of the regional approach is to maximize "food service efficiencies and technology in an effort to continue to provide quality food services for United States Marine Corps personnel and other authorized patrons while at the same time realize savings over current Marine Corps food service operating processes. AR 62 & 1581.

The current food service contracts are provided on a base-by-base, messhall-by-messhall basis, using the traditional "cook-serve" process by small businesses. According to Defendant, the regional approach to food service is driven by numerous considerations, including: (1) a savings of approximately $20 million per year; (2) budgetary shortfalls in operation and maintenance accounts; (3) the need to improve the consistency and quality of the food served; (4) advanced food technologies; and (5) the need to release Marines in the food service military occupational specialty to other Fleet operations. AR 3790-3806.

The Statement of Work (SOW) provides in pertinent part that "the Contractor shall provide all management, personnel, supervision, subsistence and other items and services as stated to perform Full Food Service (FFS), Management and Mess Attendant (M&MA), and Brig

Messhall Management and Food Preparation (M&FP) tasks at various [east coast/west coast] Marine Corps installations as defined in this Contract . . ." AR 56 & 1576. The following excerpt illustrates some of the changes from the current service:

> Under the solicitations, the number of full food service messhalls will increase to 35. USMC has current contracts for mess attendant services at 28 of the messhalls, including 18 serviced by MCS and 10 serviced by four other small business concerns. Under the solicitations, mess attendant messhalls will be reduced in number to 17 and will become management and mess attendant messhalls, with the contractors now also responsible for management of the messhalls (as well as furnishing mess attendant services). (Food preparation will continue to be performed by the USMC cooks at the management and mess attendant messhalls). The contractors also will become responsible under the solicitations for management and food preparation for three brig messhalls not previously contracted out. In addition, under the solicitations, the procurement of subsistence (food) and (after a transition period) maintenance and repair of government food preparation and serving equipment, previously the responsibility of the Government, will become the contractor's responsibility at all messhalls. Further, the number of messhalls set-aside under JWOD, 41 U.S.C. § 46-48c, is increased from 9 to 20; JWOD organizations for the blind or other severely handicapped will operate the messhalls as subcontractors to the contractors.

AR iii-iv. Currently, the USMC contracts for full food service at eight messhalls. Plaintiff provides full food

service at three of those messhalls and the other five are operated by National Industries for the Severely Handicapped ("NISH") workshops. AR 4720 & 5252. Plaintiff provides messhall management, food preparation and mess attendant services at its three full food service messhalls. *Id.*

The solicitations encourage but do not require the submission of proposals utilizing advanced food technologies like "cook chill"[2] centralized production facilities. However, the USMC believes that a successful offeror would more than likely have to base its proposal on such a centralized approach, together with cook chill technology, with 50-70 percent of the food processed in this manner. *See* AR 3790-91 & 3805-06. According to the USMC, centralized food production is fundamental to achieving the anticipated cost savings from the new procurement approach. The RFP's do not require the contractor to construct a centralized production facility. For instance, a contractor may procure "cook chill" products from an existing "cook chill" facility or contract for use of an existing "cook chill" facility from a third party. Whatever option the contractor chooses, the contractor

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[2] In its rationale for consolidating the contracts, the USMC offers the following explanation of "cook chill":

> Cook chill is a U.S. Department of Agriculture approved food production process. Cook chill utilizes industrial-sized production equipment to prepare food in large batches. When the food is at a just-done state, it is bulk-packaged hot and rapidly chilled to below 40 degrees Fahrenheit. This rapid cooling essentially pasteurizes the food and provides extended shelf lives. The refrigerated foods are then distributed to individual messhalls for reheating and service on the scheduled menu day. ***At no point in the cook chill process is the food "frozen."***

AR 4540.

is required to describe in detail its advanced food technology plans in its offer.

B. Procedural History

Plaintiff filed two pre-award protests before the GAO.[3] In those protests, Plaintiff alleged, among other issues, that Defendant's decision not to set aside the two procurements exclusively for small business concerns was improper. AR 3744-89. After discovery and a hearing, on October 11, 2000, the GAO dismissed Plaintiff's protest, finding that the "USMC reasonably concluded that there was no reasonable expectation of receiving fair market price offers from at least two responsible small business concerns so as to warrant setting aside the requirements for small business concerns." AR ix-x.

Plaintiff filed the present action on October 30, 2000, challenging Defendant's decision not to set aside these two procurements exclusively for small business concerns and seeking a temporary restraining order. On October 31, 2000, the Court held oral arguments and denied Plaintiff's motion for a temporary restraining order. The Court set a briefing schedule for cross-motions for judgment upon the administrative record. The parties filed briefs in support of their positions on November 14, 2000. Reply briefs were submitted on November 21, 2000. Plaintiff filed a motion seeking to supplement the administrative record through discovery. The Court held a status conference on November 22, 2000, at which time it denied Plaintiff's motion to conduct expedited discovery; denied Plaintiff's motion for leave to file a congressional report; and ordered that Exhibits 3-9 and 13 of Plaintiff's motion for a temporary restraining order

[3] The first protest was filed on July 10, 2000, for RFP 0001 and the second was filed on July 19, 2000, for RFP 0002.

and the Moore affidavit attached to Plaintiff's motion for permanent injunction be stricken from the record. Lastly, on December 4, 2000, the Court held oral argument on the parties' cross-motions for judgment upon the administrative record.

III. Standards of Review

A. Cross-motions for Judgment upon the Administrative Record

Pursuant to Rule 56.1 of the Rules of the Court of Federal Claims (RCFC), the parties move for cross-motions for judgment upon the administrative record. This Court treats such motions the same as a motion for summary judgment under RCFC 56. *See Nickerson v. United States,* 35 Fed. Cl. 581, 588 (1996), aff'd, 113 F.3d 1255 (Fed. Cir. 1997). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986); *Jay v. Secretary, DHHS,* 998 F.2d 979 (Fed. Cir. 1993). A fact is material if it might significantly affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc., supra,* 477 U.S. 248, 106 S. Ct. 2510. The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986). The court must resolve any doubts about factual issues in favor of the non-moving party, *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus. Inc.,* 145 F.3d 1303, 1307 (Fed. Cir. 1998) and draw all reasonable inferences in its favor. *See Gasser*

Chair Co. v. Infanti Chair Mfg. Corp., 60 F.3d 770, 773 (Fed. Cir. 1995).

The fact that both parties have moved for summary judgment is not an admission that no material facts remain in issue. *Massey v. Del Laboratories, Inc.*, 118 F.3d 1568, 1573 (Fed. Cir. 1997); *see also Prineville Sawmill Co. v. United States*, 859 F.2d 905, 911 (Fed. Cir. 1988). Summary judgment will not necessarily be granted to one party or another simply because both parties have moved for summary judgment. *Corman v. United States*, 26 Cl. Ct. 1011, 1014 (1992). A cross-motion is a party's claim that it alone is entitled to summary judgment. *A Olympic Forwarder, Inc., v. United States*, 33 Fed. Cl. 514, 518 (1995). It therefore does not follow that if one motion is rejected, the other is necessarily supported. *Bubble Room, Inc. v. United States*, 159 F.3d 553, 561 (Fed. Cir. 1998). Rather, the court must evaluate each party's motion on its own merit and resolve all reasonable inferences against the party whose motion is under consideration. *Cincom Systems, Inc. v. United States*, 37 Fed. Cl. 663, 671 (1997).

B. Pre-Award Bid Protest

Jurisdiction is pursuant to 28 U.S.C. § 1491(b)(1) which provides that:

> [T]he United States Court of Federal Claims . . . shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement . . . [T]he United States Court of Federal Claims . . . shall have juris-

diction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

The standard of review applicable to this case is the same applied by the United States District Courts to agency decisions pursuant to Section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, *et seq.* (1994). *See* 28 U.S.C. § 1491(b)(4). Section 706(2)(A) of the APA provides, in pertinent part, that a reviewing court shall set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In determining whether the government has acted arbitrarily or capriciously, Plaintiff bears the burden of showing that: (1) there was subjective bad faith on the part of procurement officials; (2) there was not a reasonable basis for the procurement decision; (3) the procuring officials abused their discretion; or (4) pertinent statutes or regulations were violated. *Keco Indus., Inc. v. United States,* 203 Ct. Cl. 566, 492 F.2d 1200, 1203-04 (1974); *see also Metric Sys. Corp. v. United States,* 42 Fed. Cl. 306, 310 (1998). There is, however, "no requirement or implication . . . that each of the factors must be present in order to establish arbitrary and capricious action by the Government." *Prineville Sawmill Co. v. United States,* 859 F.2d 905, 911 (Fed. Cir. 1988). Judicial review of an agency procurement decision is extremely limited. *Analytical & Research Tech v. United States,* 39 Fed. Cl. 34, 42 (1997). A reviewing court is not to substitute its judgment for that of the agency. *Citizens To Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416-20 (1971). In other words, if the Court finds a reasonable basis for the agency's action, the Court should stay its hand, even though with the same evidence before it the Court may have reached

a different conclusion. *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1301 (D.C. Cir. 1971). In a procurement case, a court may set aside an agency's action only when there is no rational basis for the agency's decision. *Id.* A reasonable basis for the agency decision "requires a rational connection between the facts of the situation and the decision made." *Crux Computer Corp. v. United States*, 24 Cl. Ct. 223, 226 (1991).

C. Permanent Injunction

In order to be entitled to a permanent injunction Plaintiff must establish: (1) success on the merits; (2) that it will suffer irreparable injury if injunctive relief is denied; (3) that, if the injunction is denied, the harm to plaintiff outweighs the harm to the government and third parties; and (4) that granting the injunction is not adverse to the public interest. *Bean Stuyvesant, L.L.C. v. United States*, 2000 WL 1790260 (Fed. Cl.) at 17; citing *Hawpe Constr., Inc. v. United States*, 46 Fed. Cl. 571, 582 (2000). "Because injunctive relief is so drastic in nature, plaintiff must demonstrate its right to injunctive relief by clear and convincing evidence." *Bean Dredging Corp. v. United States*, 22 Cl. Ct. 519, 522 (1991).

IV. Discussion

A. Merits

1. Small Business Set-Asides

The Federal Acquisition Regulations Section 19.502-2(b) provides in pertinent part:

> The contracting officer shall set aside any acquisition over $100,000 for small business participation when there is a reasonable expectation that:

> (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns . . . ; and (2) award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists . . . Although past acquisition history of an item or similar items is always important, it is not the only factor to be considered in determining whether a reasonable expectation exists.

FAR § 19.502-2 (b). A contracting officer's decision not to set a solicitation aside for small business concerns is a matter of business judgment within the contracting officer's discretion. *See McSwain & Assoc., Inc.; Shel-Ken Properties, Inc.; and Elain Dunn Realty,* Comp. Gen. B-271071, May 20, 1996. Although the law does not require the use of any particular method for assessing the availability of small business, the contracting officer must undertake reasonable efforts to determine whether it is likely that offers will be received from at least two responsible small businesses at fair market prices for each regional contract. *See Mortara Instrument, Inc.*, Comp. Gen. B-272461, Oct. 18, 1996. The contracting officer may consider and base its decision on such factors as prior procurement history, the nature of the contract, market surveys, and/or advice of the agency's small business specialist. *Id.*

In this case, Plaintiff argues that Defendant's decision not to set aside the two solicitations exclusively for small business concerns was arbitrary, capricious and in violation of procurement law. Plaintiff presents essentially three arguments to support its position. First, Plaintiff maintains that the contracting officer never performed an analysis of whether a reasonable expectation existed that it would receive at least two offers from

responsible business concerns at a fair market price because it assumed that the contract was too large for small business to perform. Plaintiff contends that the contracting officer's actions were unreasonable because he failed to investigate the capabilities of the small businesses that expressed interest in the solicitations. Second, Plaintiff contends that the two regional contracts do not represent a new requirement, and can be handled by small business concerns currently performing food service contracts for the USMC. Lastly, Plaintiff argues that the contracting officer incorrectly determined that the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f, prohibited the USMC from setting the procurements aside exclusively for small business concerns.

In contrast, Defendant maintains that based upon the market analysis conducted by the USMC, the contracting officer's decision that offers could not be obtained from at least two responsible small business concerns at fair market prices was reasonable. Defendant contends that the two solicitations are a new and qualitatively different approach to food service because prior contracts were much smaller in scope and not as complex as the current requirement. Lastly, Defendant argues that the contracting officer properly determined that the Randolph-Sheppard Act applied to the solicitations, thereby prohibiting the USMC from setting the contracts aside exclusively for small business.

2. The USMC Efforts to Ascertain Small Business Interest and Capability.

In 1998, the USMC began making plans for a regional approach to food service contracting. AR 3790. After several months of briefings, the Headquarters, USMC Executive Steering Committee endorsed the regional approach to food service. *Id.* The Commandant of

the Marine Corps approved the recommendation on September 10, 1998. *Id.* The USMC contends that it undertook the following efforts to determine whether the two solicitations should be set aside for small business concerns:

(1) On February 3, 1999, the contracting officer met with the Small Business Administration (SBA) to discuss the regional food service contracts. AR 4436-44. Because of these discussions, the USMC agreed to conduct two industry forums, one on each coast, to ascertain small business interest. AR 3792.

(2) On February 9, 1999, the contracting officer sent letters to all eight incumbent small business contractors providing advanced information concerning the regional food service initiative and asking for input from small business.[4] *See* AR 4684-99.

(3) On March 3, 1999, the contracting officer issued a pre-solicitation notice to 33 companies that had expressed interest in the synopsis of the contracts in the Commerce Business

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[4] The letters read in pertinent part:

> As an incumbent Marine Corps food service contractor, you will likely be affected by and have an interest in this initiative. For this reason, we are writing you directly regarding the program . . . We would . . . encourage your participation and thoughts on: (1) how small businesses can best remain involved, and/or (2) how innovative techniques and technologies can best be applied to our requirement . . . After you have had a chance to review our consolidated requirement and new approach to meeting that requirement, we would welcome whatever thoughts or concerns you might have, expressed directly in response to the RFI or at the follow-up industry forum.

Daily. AR 4445-51. Specifically, the contracting officer asked the food service industry how it proposed to service the Marine Corps bases on a regional basis.[5] AR 4446.

(4) On May 11 and May 13, 1999, the USMC held industry forums at Camp Lejeune, North Carolina and Camp Pendleton, California, respectively, in an effort to determine small business interest and capabilities. *See* AR 4468-82.

(5) On July 14, 1999, the USMC held a meeting with the SBA to discuss the results of the

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[5] In the cover letter the contracting officer wrote:

> Our goal is to gather as much information from the food service industry as possible with respect to general approaches in fulfilling our requirements, as well as specific issues of concern to interested parties. Your comments and thoughts will be invaluable to us as we finalize our Statement of Work and Request for Proposal.

AR 4445.

The pre-solicitation notice provided in pertinent part:

> The Government wants to learn how industry would propose to service Marine Corps bases on a regional basis. In this regard the Government will entertain any and all suggestions regarding advanced food service preparation methodologies and technologies to maximize food service support efficiencies and savings. Therefore, you are encouraged to submit any concepts, ideas and suggestions that you would like us to consider in developing the final Statement of Work and Request for Proposal (RFP).

AR 4446.

The notice also stated, " . . . each mess hall presently under contract is receiving service from either a small business or a non-profit agency . . . We ask for your views, . . . on how the impact on JWOD and small business communities may be minimized; e.g., through teaming arrangements or subcontract relationships." AR 4447.

pre-solicitation notice, the industry forums, a Freedom of Information Act request concerning the procurements, and the impact of the Randolph-Sheppard Act. AR 3793.

(6) On July 31, 1999, the contracting officer issued a draft statement of work (SOW) and proposed evaluation factors for award for industry comment. *Id.*

(7) On September 15, 1999, after consultation with the USMC small business specialist, the contracting officer notified the SBA of its decision to consolidate the requirement and issue the procurement as unrestricted. AR 4529-30.

(8) On October 12, 1999, the SBA produced five letters from small business concerns, dated July 6, 8, 12, 13, 1999, which expressed an interest in the two contracts. AR 4483-99. The contracting officer reviewed the five letters and determined that the information contained in them did not demonstrate that at least two responsible small business concerns would submit offers. AR 3797-98.

(9) The contracting officer also consulted, as he did in the past, with the USMC small business specialist, Ms. D'Agostino, who agreed that it was inappropriate to set aside the two solicitations exclusively for small business. AR 4676.

(10) The decision not to set aside the solicitations exclusively for small business was also reviewed by several levels within the USMC. AR 3794. The SBA appealed the contracting

officer's decision to the Head of the Contracting Activity (HCA) and the Assistant Secretary of the Navy for Research, Development, and Acquisition. AR 3795. Both of these appeals were denied. *Id.*

(11) In response to a request made by the GAO on September 8, 2000, the USMC conducted further investigation into the capabilities of small business concerns using SBA's PRO-Net system and Dun & Bradstreet reports. AR 4761. The USMC also requested additional information directly from small businesses concerning current DOD contracts for mess attendant and food service contracts.[6] AR 5390.

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[6] On September 26, 2000, the USMC small business specialist provided the GAO additional information on small business capability. *See* AR 5390-95. Specifically, information was requested from Triple P Services, Inc., H&R Services, Inc., Rice Services, Ltd., and Selrico Services, Inc. *Id.* The small business specialist indicates that:

> Information was requested directly from these companies as well as from the Small Business Administration, and from cognizant Government contracting officers and agency small business specialists. Triple P Services and Selrico Services provided information by fax. Rice Services responded orally. H&R Services promised to send information by fax, but nothing has been received despite several follow-up phone calls. The contract information for H&R Services was obtained from a contracting officer. The Small Business Administration has provided no information.

AR 5390.

3. The contracting officer's decision was not arbitrary or capricious because it was a reasonable business decision supported by the record.

Plaintiff's argument that the USMC failed to perform an analysis of whether there were two responsible small business concerns that would submit offers at fair market prices is wholly without merit. This assertion is not supported by the record. On the contrary, the record indicates that the USMC went to great lengths to publicize the solicitations and to ascertain small business interest and capabilities. The contracting officer did not abuse his discretion in deciding not to set aside the two contracts exclusively for small business because his decision was based on a rational assessment of the scope and complexities of the solicitations, the prior procurement history, input obtained from industry and consultations with the SBA and the USMC's small business specialist. Plaintiff may disagree with the contracting officer's chosen methods; however, Plaintiff has failed to prove that the decision was unreasonable.

Despite the efforts outlined above, Plaintiff nonetheless argues that the USMC did not conduct an analysis to ascertain whether there were at least two responsible small business concerns that would submit offers at fair market prices. Plaintiff places great emphasis on language contained in letters sent by the contracting officer to small business concerns. Specifically, Plaintiff refers to the following language in the March 3, 1999 presolicitation notice:

> A critical element of this acquisition is the socio-economic considerations that the Government advocates by various statutes and implementing regulations. As can be seen on the following charts

> each mess hall presently under contract is receiving services from either a small business or a non profit agency performing under the Authority under the Javits Wagner Oday Act (JWOD) Act. We ask for your views, in response to this Pre-solicitation Notice on how the impact on the JWOD and the small business communities may be minimized; *e.g., Through teaming arrangements and sub contracting relationships.*

AR 4447 (emphasis added). Plaintiff contends that this language illustrates that Defendant assumed small business could not perform as a prime contractor. Because of this assumption, Plaintiff contends that no analysis, "let alone a reasoned one," was performed of whether at least two small business concerns would submit offers at fair market prices. Considering the scope and complexity of the new requirements, the Court cannot fault the USMC for questioning whether small business concerns were capable of performing the new requirements. But this does not prove that the USMC failed to perform any analysis.

As set out above, it is evident from the administrative record that the contracting officer used a variety of methods to ascertain small business interest and capabilities. The law does not require any particular method. For instance, in the cover letter of the presolicitation notice, the contracting officer stated: "Our goal is to gather as much information from the food service industry as possible with respect to *general approaches in fulfilling our requirements, as well as specific issues of concern to interested parties.*" (emphasis added). *See also supra* note 4. This language evidences the USMC's attempt to ascertain small business interest. The failure on the part of small business to seize this opportunity

reflects poorly on small business concerns not on the efforts of the contracting officer.

Plaintiff also relies on a statement made by the USMC small business specialist in response to questioning from the GAO:

> Ques: What efforts did the agency take to investigate the capabilities of the small business concerns that made known, before the solicitation was issued, their interest in competing?
>
> Ans: The Marine Corps did not do a detailed investigation of the capabilities of the five firms that submitted letters. There was no requirement to do so, and indeed, the letters spoke for themselves. Three of the letters were brief form letters containing nothing substantial beyond their expressions of interest. The other two letters reflected experience in terms of relatively small contracts at single installations. There was nothing in any of the letters that would have warranted further study or investigation.

AR 4679-80. Plaintiff argues that the above statement also supports its contention that the USMC did not conduct any analysis of whether there were two responsible small business concerns that would submit offers at fair market prices. Market surveys, however, are only one method of determining whether to set aside contracts exclusively for small business. The USMC small business specialist explained:

> This regionalization effort does not lend itself to the traditional market survey method, where a determination is made of the number of small business

> sources for a particular product or service, and how many offers are likely to be received under a solicitation. This is because the Regional Garrison Food Service initiative represents a new concept with no procurement history. There has been no comparable food service endeavor, in size or complexity, within the Department of Defense. While there are numerous smaller food service contracts, no such contract to date is of the magnitude contemplated by the solicitations in question. Thus there is no valid historical model that we can use to affirm that small businesses can compete and do the job, and a market survey will not identify small firms that can reasonably be expected to submit viable offers. Because the traditional market survey approach was not appropriate in this procurement, we used some other approaches to identify small business interest and capability to perform this fundamentally new and qualitatively different approach to the provision of food service in the Marine Corps.

AR 4677-78. The Court finds the USMC small business specialist's assessment rational.

Plaintiff appears to argue that the contracting officer had an affirmative duty to ask small business concerns, that expressed interest in the contracts, how they would perform the requirements of the contract. Specifically, Plaintiff refers to the small business concerns that submitted letters in July of 1999, to the SBA. To support its assertion, Plaintiff relies on *Griffy's Landscape Maintenance, LLC v. United States*, 46 Fed. Cl. 257 (2000). That case is inapposite, however. *Griffy's* involved a post award challenge to a contract for tree trimming and right of way maintenance services at a military installation. *Id.* In that case, the agency failed to award Griffy points for a past-performance factor because of absent

insurance point of contact information. *Id.* at 258. The court held that the agency's failure to inquire concerning the absence of insurance information in *Griffy's* bid was arbitrary and capricious. *Id.* The court found that the agency had a duty to inquire because the absence of the information indicated a clerical error. *Id.* Moreover, 48 C.F.R. § 14.406-1 required "in cases of apparent mistakes or where the contracting officer believed that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bids." *Id.* at 259.

The present situation is unlike that in *Griffy's*. This case does not involve a clerical error as in *Griffy's*. Furthermore, Plaintiff fails to cite a FAR provision that mandates an affirmative duty to inquire as was present in *Griffy's*. Here, the contracting officer must undertake reasonable efforts, but there is no statute that requires a particular method or imposes a duty to inquire.

Plaintiff also cites a number of GAO decisions as models[7] of what it believes the USMC should have done to ascertain whether the solicitations should have been set aside exclusively for small business. The Court is not bound by GAO decisions. The case law, although instructive, does not mandate that a contracting officer must contact a small business concern in every instance and ask how they would perform a potential contract, as Plaintiff argues should be done. Particular circumstances may trigger an obligation on the part of the contracting officer to further inquire, but a duty to inquire, as argued by Plaintiff, is not mandated by statute or regulation. The determination to use one particular method over another in assessing whether a reasonable expectation

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[7] Plaintiff relies heavily on two cases: *McSwain & Associates; Shel-Ken Properties, Inc.; and Elaine Dunn Realty*, B-271071, May 20, 1996, and *Safety Storage Inc.*, B-280,851, October 29, 1998.

exists that at least two small business concerns will submit offers is within the contracting officer's discretion. Moreover, the determination is highly dependent on the particular circumstances of the case. Thus, the cases are distinguishable.

In *Safety Storage, Inc.*, Comp. Gen. B-280,851, October 29, 1998, the agency's decision was found to be unreasonable when, without supporting facts, its decision not to set aside the requirement for small business was based primarily on the complexity of the procurement and the fact that it was a first time buy. *Id.* at 3. The GAO determined that the contracting officer had not undertaken reasonable efforts in ascertaining small business capacity to perform the contract. *Id.* Unlike the present situation, the GAO noted that there was no evidence in the record that the contract was beyond small business capability, or that the agency had surveyed the three small businesses that had expressed interest in the solicitations to assess their capabilities, or that there had been any attempt to coordinate its determination with its small business specialist or the SBA. *Id.* The Court notes that the GAO did not specify how the contracting officer was to survey the capabilities of small business, it merely stated that there was no evidence that it had done so.

In *McSwain & Associates, Inc.; Shel-Ken Properties, Inc.; and Elaine Dunn Realty,* Comp. Gen. B-271071, May 20, 1996, the contracting officer's decision was found unreasonable where it was based on incomplete information and unsupported assertions. That case involved real estate asset manager services. *Id.* at 1. The contracting officer concluded that the service areas were too large to be successfully serviced by small business but, unlike this case, had not performed a comparison of current requirements to those service areas successfully performed by small business. *Id.* at 2. The GAO con-

cluded that the contracting officer "did not conduct an adequate review of the potential small business market. *For instance,* the agency did not contact any of the small businesses that expressed interest in the contract, or those with known REAM[8] contract experience to ascertain whether they were qualified to meet the increased requirements." *Id.* (emphasis added). In the present situation, the contracting officer sent letters to the small business concerns asking how they could service the USMC regional food service requirements. *McSwain,* however, does not mandate any particular method, it merely suggests certain methods. From a careful reading of *McSwain,* it is evident that the contracting officer could have contacted the small businesses, but it was not a requirement.

In *Wind Gap Knitwear, Inc.,* Comp. Gen. B-251,411 March 31, 1993, the contracting officer's decision was found to be unreasonable when it was based upon outdated and incomplete information. In this case, the contracting officer's decision is supported by a recent assessment of small business capabilities. *See* AR 4761-63 & 5390-95.

In another case, unlike the present situation, a contracting officer's decision was found unreasonable where the contracting officer relied upon outdated procurement history instead of investigating the numerous small business responses to its announcement in the Commerce Business Daily, or performing a current market survey or consulting the small business representative or SBA. *See ACCU-Lab Medical Testing,* Comp. Gen. B-270,259, February 20, 1996. A decision not to set a contract aside for small business also cannot be based solely on a procurement that is dissimilar in size and scope, especially

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[8] REAM is an abbreviation for Real Estate Assent Manager Services.

when the current requirement is a reduction in size and scope from the previous requirement. *See American Imaging Services, Inc.*, Comp. Gen. B-246,124, February 13, 1992. In this case, the contracts have increased in size and complexity.

In short, the above cases illustrate that in order for a contracting officer's decision to be reasonable, there must be a rational connection between the facts and the decision made. Gaps in logic and reason lead to arbitrary conclusions. Although reasonable efforts must be undertaken, no particular method is mandated.

The parties also are in disagreement as to whether the two solicitations are fundamentally new and qualitatively different. Plaintiff contends, although the contracts are larger, they are essentially the same because the Marines will be eating the same food. In contrast, Defendant argues that the two solicitations are not only larger but highly more complex. Because this factor played a large role in shaping the USMC efforts to ascertain small business interest and capabilities, Plaintiff challenges this contention. If the Court were to find the requirements to be essentially the same as the existing contracts, this would tend to favor small business because the USMC is currently contracting with small business. However, Plaintiff's position is without merit. After careful review of the requirements, the Court agrees with the USMC's assessment that the requirements are fundamentally new and qualitatively different. The following excerpt from a statement of the contracting officer highlights the differences in scope and complexity of the requirements:

> 5. My decision not to set aside the solicitation for small business was based on a number of factors. The first and most significant consideration was the scope of our regional efforts. Our existing contracts

at each base call for messhall services, either full food services (encompassing both food preparation and mess attendant services) or mess attendant services only. The Marine Corps acquires the necessary food, provides the food to the contractor, and maintains the food service equipment on site. The contracts are structured on a firm-fixed price basis, with a base period of performance of one year or less, and three to five one-year options. In contrast, the regional contracts will involve multi-location responsibilities at all of our garrison messhalls within the continental United States. At most of the messhalls, the contractor will be required to provide full food service, at less than one-third of the messhalls the requirement will be for mess attendant services, and at three messhalls food preparation only will be required. The prime contractor will also be responsible for the acquisition, ownership, storage, and distribution of food, to both the central food production facility (if used) and to the messhalls. Maintenance of food service equipment will, starting in the second year of the contract, be a responsibility of the contractor. Thus the prime contractor will be ultimately responsible for not only the service element, as before, but also the supplies (raw and prepared food) in the messhalls, and equipment maintenance.

6. The contract itself will be far more complex than anything the Marine Corps has attempted in the food service arena. A multi-year contract, with a base five-year period and three one-year options, is planned. This contract type was chosen in consideration of the possibility that the prime contractor may choose to make a substantial investment in advanced food technology early in the contract term

to achieve long-term savings. Our multi-year contract offers the guarantee of at least a five-year contract (with a cancellation charge in the event of earlier termination), over which such investment costs can be amortized, and thus affords the contractor a significant level of protection against financial risk. It is noted that both small businesses and the SBA requested that we consider the use of a multi-year contract to help level the playing field with large businesses from the standpoint of risk. In addition, we require that offerors price the effort on a Fixed-Price Incentive (FPI) – Firm Target basis. We ask that all costs, with the exception of equipment maintenance and extended service hours, be consolidated into a single, per-meal price. There is no breakdown by meal (breakfast, lunch, breakfast brunch, etc.), by messhall, or by type of services required. All labor, subsistence and overhead must be rolled into each yearly per-meal line item. The contract will set forth, for each contract year, a single Target Cost and Target Profit figure for each meal served, with the amount of final profit paid based on whether actual costs incurred are above (overrun) or under (underrun) target cost. While provisional payments will be made every two weeks based on the projected number of meals served, adjustments will be made quarterly for actual meals served and deductions made for performance below established standards.

7. The regional contractors will be required to assume responsibility from the incumbent contractors at every messhall within the region, with no break in service. The Phase-In Plan will be critical—while the contractor will not be required or expected to take over all messhalls in the region on

> a single day, the more quickly that can be accomplished the more favorably the proposal will be viewed. Similarly, if the successful offeror includes advanced food technology into its plan, integrating that technology into its overall approach as quickly as possible poses another challenge. Interfacing with the various NISH CRPs, both in negotiations prior to contract award and in a prime/subcontractor relationship after award, is required due to the mandatory nature of the JWOD Program.

AR 3798-99. In short, the evidence in the record provides ample support that the requirements in the RFP's are fundamentally new and qualitatively different than the current contracts.

In this case, Plaintiff has failed to prove that the contracting officer's decision was unreasonable or in violation of procurement law. The record indicates that the contracting officer took reasonable efforts to ascertain small business interest and capabilities. According to the contracting officer, very little meaningful input was received from any small business concerns in response to letters sent or industry forums conducted. For instance the March 3, 1999, pre-solicitation notice sent to 33 companies elicited 13 responses, four of which were from small businesses. Those responses, the contracting officer determined, did not provide an indication that any small business could perform the requirements. Rather, the responses were criticisms and complaints concerning the regional initiative. *See* AR 4455-67. The contracting officer also concluded that the coastal forums yielded little useful information concerning small business capabilities based on his assessment of questions and discussions with attendees. Furthermore, the record indicates that no small business concerns contacted the contracting officer to express interest in the

solicitations after the industry forums. The Court also notes that no small business concerns responded to the Statement of Work issued on July 31, 1999. Thus, it was rational for the contracting officer to interpret the lack of response to the USMC initiatives as a lack of interest in the requirements of the contracts.

The record indicates that the capabilities of small business continued to be evaluated after the contracting officer made his determination not to set aside the two solicitations for small business. Specifically, the contracting officer and the small business specialist analyzed the five letters brought to its attention on October 12, 1999, by the SBA.[9] The Court finds it peculiar that the SBA received expressions of interest from five small business concerns in July of 1999, but did not forward these letters to the contracting officer until October 12, 1999, after the determination to issue the two solicitations as unrestricted was made. This is especially odd because the contracting officer met with the SBA in July to discuss the solicitations. Nonetheless, the record indicates that despite the late arrival of these letters, the contracting officer reviewed the letters and determined that they did not demonstrate that at least two responsible small businesses could reasonably be expected to submit offers. AR 3797. The contracting officer was of the opinion that the letters evidenced a lack of effort and attention to detail on the part of the firms submitting the letters. *Id.* In particular, the contracting officer noted that four of the five letters submitted contained the following identical language:

> It is our intention to submit a proposal regarding any RFP the Marine Corps advertises in the food

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[9] The five letters were submitted by Selrico Services, H&R Services, Triple P Services, Rice Services and Moore's Cafeteria.

> service area, including the possible regionalization of these services. The following is a brief company history that demonstrates our ability to provide a fair market offer and our capability of performing that contract requirements.

AR 4483, 4486, 4487&4499.

He concluded that the letters appeared to be modeled after a generic form letter. The letter sent by H&R Services also supports this theory. In that letter, the drafter failed to delete the statement: "(Note: Please provide company information/business history here.)" *See* AR 4499. Additionally, considering the scope and complexity of the new requirements, the contracting officer assessed that the information provided by small business concerns did not warrant a small business set aside. The Court concludes that the contracting officer's assessment of the letters was reasonable. *See* AR 3794-98.

The contracting officer's decision is supported by a current market analysis. During the proceedings before the GAO, the parties were presented with the opportunity to provide additional information on the capabilities of small business.[10] The contracting officer and the USMC small business specialist using the Small Business Administration's PRO-Net system and Dun & Bradstreet reports further researched the capabilities of the business concerns. *See* AR 4761. The USMC small business specialist also requested additional information from small business concerns relating to current DOD mess attendant and food services contracts. *See* AR 5390. Even after consideration of the additional infor-

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[10] Further inquiry was conducted with respect to the business concerns that submitted letters of interest in July of 1999. These include: Triple P Services, Inc.; H&R Service, Inc.; Rice Service, Ltd.; Selrico Services, Inc.; and MCS. However, no further information was requested from MCS.

mation, the contracting officer concluded that there was no basis for making a determination that there is a reasonable expectation of receiving offers from two small business concerns at fair market prices. The Court finds this assessment reasonable.

For instance, Dun and Bradstreet assigned H&R Services a credit rating of limited because of its "slowness in meeting trade obligations and open suit, liens or judgments" in Dun and Bradstreet's file. AR 4763. Moreover, in comparison to the regional food service requirement, the contract listed for H&R Services was for a small amount ($568,960 highest year) and was only for mess attendant services. AR 5391. Because of the shaky financial history, the contracting officer rationally concluded that H&R Services would be a poor candidate for the regional food service procurements.

The information obtained concerning Rice Services indicated two contracts, one for messhall services ($2.6 million) and the other for full service ($543,576). AR 5391. The small business specialist ascertained that Rice's experience did not evidence an ability to manage a regional food service contract. *Id.* In particular, the Court found it interesting that Dun & Bradstreet reported that on August 24, 2000, a partner with the company declined all financial information and that the company would not disclose the number of employees. AR 4761.

With respect to Triple P Services, the PRO-Net report indicated gross receipts of $10.5 million and 500 employees. AR 4762. However, only one full food service contract was listed valued at $1 million a year with a period of performance of four years and ten months. *Id.* The Dun & Bradstreet report indicated that Triple P Services' primary business is janitorial services and only five percent of its work is in the area of food service. *Id.* According to information provided by the company, it

has three contracts for mess attendant services valued for less than $1 million per year. AR 5390.

The record indicates that Selrico provided information on thirteen contracts, seven for mess attendant services, three for food service and three for full food service. AR 5391. Based on an evaluation of these contracts, the USMC small business specialist determined that there was no indication that the company could perform a regional contract. *Id.* It was also noted that the company was "determined to be outside of the competitive range due to deficiencies in its technical proposal" in a recent food service competition conducted at Camp Pendleton. AR 4762.

From the Court's own review of the information, there is nothing unreasonable or irrational about the contracting officer's or small business specialists' assessment of the small business capabilities. Even assuming that Plaintiff would be a responsible offeror, the contracting officer reasonably concluded that there is not another responsible small business concern.

V. Conclusion

The Court concludes that the contracting officer's determination not to set aside the solicitations exclusively for small business concerns was not arbitrary or capricious or in violation of procurement law because it was a reasonable business decision.[11] Because Plaintiff fails on the merits, Plaintiff is not entitled to a permanent injunction.

Plaintiff's motion for judgment upon the administrative record in which it sought an injunction is DENIED. Defendant's motion for judgment upon the administra-

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[11] Because the Court finds that the contracting officer's decision was reasonable and did not violate procurement law, the Court does not address the issue of the Randolph-Sheppard Act.

tive record is GRANTED. The Clerk of the Court is directed to enter judgment for Defendant and is ordered to dismiss the complaint.

EDWARD J. DAMICH
Judge